United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20,120 563

TOMMIE D. LEWIS,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From A Judgment of the United States
District Court for the District of Columbia

John S. Nolan
(Appointed by this Court)

Burke W. Willsey

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Washington, D. C. 20006

Counsel for Appellant

QUESTIONS PRESENTED

1. Where the only evidence of the alleged murder was inherently incredible testimony of two friends of the deceased, and where the appellant's testimony showing self-defense was more consistent with surrounding circumstances, should not the trial judge have entered judgment of acquittal on the ground that a reasonable man would necessarily have had a reasonable doubt whether appellant had acted with malice aforethought?

2. Where evidence of several prior assault convictions was unexpectedly introduced by the prosecutor, and where the trial judge failed to exercise discretion or to apply the standards of the Luck case before permitting such evidence to be introduced, should not the appellant be granted a new trial with instructions to the trial court to exercise such discretion?

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JURISDICTIONAL STATEMENT

Tommie D. Lewis was indicted for second degree murder on October 11, 1965, by the Grand Jury for the District of Columbia (Orig. Rec.). He pleaded not guilty on October 22, 1965 (Orig. Rec.), was tried February 3 and 4, 1966 (Tr. 1, 154), and was found guilty as charged by the jury (Orig. Rec.). On March 11, 1966, the Court sentenced him to imprisonment for a period of not less than five years nor more than twenty years (Orig. Rec.). The defendant filed a Notice of Appeal on March 22, 1966, and an Affidavit in Support of Application to Proceed without Prepayment of Costs on March 29, 1966 (Orig. Rec.). On April 1, 1966, the District Court granted appellant's application to proceed on appeal without prepayment of costs (Orig. Rec.). Jurisdiction is vested in this Court to decide this appeal by virtue of 28 U.S.C. §1291 and §1294.

STATEMENT OF THE CASE

A. Events Leading Up To Death

The incidents giving rise to this case took place on Sunday, September 12, 1965, in Washington, District of Columbia. On that day, the appellant was married to the deceased, Octavia Walker, at a wedding salon on 14th Street (Tr. 16, 112). Immediately following the wedding, a reception for the bride and groom took place at the same address,

and alcoholic beverages were served (Tr. 19, 51, 112-115).

As the reception came to an end, the appellant's wife, who had been drinking, became "loud" (Tr. 31), and then became quarrelsome in a discussion with the appellant as to how much the band was to be paid (Tr. 113). There was testimony that the deceased drank heavily on occasion, would then get angry "real quick" (Tr. 28), would become very loud on such occasions, and was a strong woman (Tr. 29).

At the reception, appellant and his wife were observed on the porch of the wedding salon engaged in what was first thought to be "hugging and kissing" but was then described to the jury as an attempted choking of the deceased (Tr. 15-16, 32). However, Mrs. Sterling, the prosecution witness who had observed the incident, then testified that the deceased said that "everything was all right" and that they were only playing (Tr. 16, 31-32, 34). Appellant testified that the porch incident was merely an accident (Tr. 16, 114, 125).

The same prosecution witness, Mrs. Sterling, then testified that appellant was observed shortly thereafter "apparently fighting" with his wife on a street corner, causing her to fall and injure her knee outside the wedding salon (Tr. 17, 29). Appellant testified that the significance of the incident was misunderstood (Tr. 115, 130-131), and that the knee injury was caused when the witness' husband threw

appellant to the ground and he accidentally pulled his wife down with him (Tr. 130).

After the reception, the wedding party went to the home of the bride's mother (Tr. 18, 34, 52, 116), and then to the apartment shared by the appellant and the deceased (Tr. 21, 52, 79, 116). At the apartment, the members of the party continued drinking, and started playing records and dancing (Tr. 21-23, 37-38, 61). Appellant and the deceased changed clothing (Tr. 22, 38, 60, 118), as did one or more of the guests (Tr. 38, 118). The prosecution witness testified several times that the appellant and his wife were "okay", that they together had invited the guests to their apartment, and that they both had repeatedly reassured the guests that all was well between them (Tr. 20-23).

The deceased then placed a telephone call to Detroit (Tr. 22, 145), and she and appellant entered a bedroom and the door was closed (Tr. 22, 55, 135). Mrs. Dorothy Humphries at some point went into the bedroom (Tr. 24, 56, 119), and her husband, Norman Humphries, also entered the bedroom (Tr. 56, 119). The Humphries had been close friends of the deceased for fifteen to twenty years (Tr. 50, 68-69, 78).

The deceased was upset, saying that appellant had "embarrassed" her, that she was going to return the wedding gifts and go to Detroit (Tr. 65, 121, 126-127). She also asked Mr. and Mrs. Humphries to spend the night at the apartment (Tr. 56, 132).

At this point, the witnesses' testimony as to what occurred is irreconciliable. The appellant testified that Mrs. Humphries changed clothes in the bedroom and that she and her husband then left before the actions resulting in the death of the deceased occurred (Tr. 119, 135-137). Mr. and Mrs. Humphries (prosecution witnesses) testified that they both remained in the bedroom and were there when the actions resulting in the death occurred (Tr. 56-59, 81). Mrs. Sterling (prosecution witness) testified --

> "So she (Mrs. Humphries) went and knocked on the door and apparently everything was all right and she turned away. Then she went on into the bathroom. She came back out of the bathroom and she knocked on the door again, and then she went inside.
>
> "Then the door came wide open, and then she said, 'Oh, my goodness.' Then I told my husband, 'Go and see.' " (Tr. 23-24).

Mrs. Sterling's testimony then went on to state that the deceased was lying on the bed covered with blood with the defendant near her and that her husband (Mr. Sterling) and Mr. Humphries were in the room at that time. There is no clear indication from Mrs. Sterling's testimony that Mr. Humphries accompanied his wife into the room or that either Mr. or Mrs. Humphries were in the room prior to the actions resulting in the death.

B. <u>Testimony of Mr. and Mrs. Humphries</u>

Mrs. Humphries testified that she entered the bedroom

and stayed there. There were no sounds or arguments prior to her entering, and she did not expect anything unusual to happen (Tr. 63). She testified that her husband came in, said he (Mr. Humphries) was sleepy, laid back on the bed, and went to sleep (Tr. 59, 64, 74). Mrs. Humphries testified that she, appellant, and the deceased were talking, "saying nothing important;" and she turned away to get a cigarette from the chest of drawers. She testified that when she turned back, the deceased was lying flat on the bed and that appellant had a knife in his hands, but that she did not see appellant stab his wife (Tr. 56-57). At that point, she ran out of the room screaming, and her husband awakened by her scream, took the knife from appellant without resistance. Mrs. Humphries several times volunteered the statement that she did not see the appellant stab his wife (Tr. 57, 59).

Mrs. Humphries also testified that while she was in the room and when she turned away for the cigarette, she heard no scuffling, no loud arguments, and nothing unusual (Tr. 70, 72-73). One moment the deceased was perfectly all right, talking normally to appellant and Mrs. Humphries. The next instant when Mrs. Humphries turned back, the deceased was lying back on the bed and the appellant had a large hunting knife in his hand. At some point, the deceased incurred two stab wounds and three cuts, though the deceased (according

to Mrs. Humphries) made no outcry and there was no scuffle, no resistance, and no prior argument (Tr. 72-74). Mrs. Humphries had not seen the knife until it suddenly appeared in the appellant's hand when she turned back (Tr. 74).

Mr. Humphries testified that he entered the room about ten or fifteen minutes after his wife (Tr. 91), and sat on the edge of the bed with his head down (Tr. 81). He said he did not go to sleep (Tr. 94), although Mrs. Humphries had stated three times that her husband was asleep (Tr. 59, 64, 74). He also heard nothing unusual, no arguments, no scuffling or moving around, no screaming or fighting back, no shouting or hollering prior to the alleged actions causing death (Tr. 93-95). According to his testimony, he was sitting on the edge of the bed when suddenly he heard his wife scream, he looked up, and appellant was --

> "pounding like this (demonstrating) and I thought he was just smacking her until I saw the blood and then I grabbed it, taken the knife away from him and I didn't hear any more.
>
> "Q. Now, how many times did you see him raising and lowering his hand?
>
> "A. Around three or four times.
>
> "Q. And what did you see her doing?
>
> "A. Not anything." (Tr. 82).

Mr. Humphries testified that he did not see the deceased until she was lying back on the bed, after the wounds had been inflicted (Tr. 95), but then testified that the appellant

pushed her back on the bed and "started pounding" (Tr. 96). He said the appellant offered no resistance when he took the knife (Tr. 97).

Mr. Humphries also testified that when he returned with the police officers, the appellant stated he would rather see his wife dead than alive (Tr. 84). The police officer testified that the appellant stated "That's my wife, Officer. I killed her" (Tr. 101-102).

C. Testimony of Appellant

The appellant testified that he and his wife had not been struggling earlier that day on the porch outside the wedding salon. Instead, in an attempt to lift her up to sit on the banister, they had fallen over together (Tr. 114, 125). He testified that both he and his wife had been drinking at this point in time (Tr. 114). He also testified that he and his wife had not been fighting on the street corner (Tr. 115).

Appellant testified that he had been working at two jobs, working regularly fourteen hours a day, and had paid for part of the furnishings in the deceased's apartment (Tr. 116). He testified that when the party was adjourned to his wife's apartment, everyone was sitting around for a while, admiring the furnishings (Tr. 117). Describing his wife's condition, he said --

> "And everything was fine. It was fine, no arguments or anything. And every once in a while, she would give out a loud burst of cursing, but neither of us said anything to her in order to just keep her quiet." (Tr. 117-118).

He said that later he and his wife went into the bedroom and that Mr. and Mrs. Humphries came in and Mrs. Humphries changed clothes with the deceased's approval (Tr. 119). His wife again became angry, took off her wedding rings, and threw them under the bed (Tr. 121). The Humphries left the room, and the deceased angrily accused appellant of watching Mrs. Humphries change clothes while they all four had been in the bedroom (Tr. 120).

Appellant testified that his wife then slapped him, and he pushed her back on the bed. His wife then took the hunting knife from the night table drawer beside the bed (Tr. 140-141). The knife belonged to her; she had kept it in the night table for protection (Tr. 123). Then, his wife stood up with the knife and --

> "She made the first swipe at me. She lost her balance. I got behind her and tried to pin her arms so I could get the knife away from her but we tussled and we both fell face down on the bed; and when she rolled over, I grabbed the knife and snatched it away from her." (Tr. 120).

While he had her arms pinned, they struggled; the deceased was trying to hit him with a free arm (Tr. 138). They fell across the bed; she with the knife in her hand fell on her

stomach, and he fell on top of her (Tr. 139). After he finally had wrestled the knife from her, he realized she was hurt. Someone came in the room, the police came, and he told the officer he had killed his wife (Tr. 122). On cross-examination, appellant reiterated that no one else had been in the room when the actions resulting in death occurred (Tr. 146).

D. Other Facts

Police Officer Fitzer, who had responded to Mr. Humphries call, testified that he entered the apartment and found the deceased lying across the bed. He observed knife wounds, and blood was readily apparent. He observed that the deceased was not breathing, telephoned for an ambulance, and placed the appellant under arrest and accompanied him to police headquarters. (Tr. 101-102).

The Deputy Coroner of the District of Columbia performed an autopsy on the deceased on September 13, 1965, and determined that deceased suffered six injuries: a stab wound to the right front chest, a stab wound to the right side of the chest, a superficial cut on the front of the neck, a wound on the back of the left hand, a small cut on the right third finger, and an abrasion on the right knee. (Tr. 43-44). It was stipulated that the deceased was pronounced dead at 1:35 a.m. on September 13, 1965, at D. C. General Hospital (Tr. 49).

Appellant was indicted for second degree murder on October 11, 1965 (Orig. Rec.), and was tried before Judge Howard F. Corcoran after having pleaded not guilty (Orig. Rec.).

Prior to going forward with the trial, appellant's counsel renewed a motion for mental observation that appellant had raised pro se (Tr. 4). Counsel informed the Court that the basis for the motion was that appellant had taken a pill described as a tranquilizer prior to the events described at the trial, and that as a result, he was unable to understand or rationalize the effect of the acts that took place on that night (Tr. 4). The Court determined that appellant was able to assist his counsel in his own defense, that he understood the nature of the charges against him, and the penalties, that he understood his right not to take the witness stand, and that he remembered the facts as they occurred on the night in question (Tr. 7-9). After receiving this information, the Court decided to permit the trial to proceed (Tr. 9).

At the close of the prosecution's case, appellant's counsel moved the Court for a judgment of acquittal, which the Court denied (Tr. 109). After proof was closed and final arguments had been made to the jury, Judge Corcoran charged the jury both as to second degree murder and manslaughter. The manslaughter charged was included at the request of defense

counsel in the event the jury should conclude that appellant was provoked to a heat of passion by his wife's slapping (Tr. 159-160, 192-195), or that appellant had used excessive means in defending himself and thereby caused his wife's death (Tr. 158, 196-198).

STATUTES INVOLVED

District of Columbia Code (1961 Ed. as amended), §§22-2403 and 14-305, which sections are printed as an appendix to this brief.

STATEMENT OF POINTS

The District Court erred:

1. Appellant's motion for a judgment of acquittal at the close of the prosecution's case should have been granted because the testimony was so inherently incredible that a reasonable man necessarily would have had a reasonable doubt.

2. Judgment of acquittal should have been entered on the close of proof because the appellant's explanation of the facts was reasonable, was consistent with the surrounding circumstances, and would not support a conviction of second degree murder because of the absence of malice.

3. The admission of evidence of prior assault convictions without exercise by the trial judge of any discretion was plain error; such evidence was admitted allegedly to attack credibility of the appellant but in fact to show a propensity to violent conduct.

SUMMARY OF ARGUMENT

The prosecution's case rested on the testimony of two witnesses, old friends of the deceased, which is incapable of reasonable belief. The deceased was a strong and belligerent woman, who had been drinking, cursing, and carrying on prior to the alleged stabbing. The witnesses testified that they were in the room with the deceased and appellant, talking normally, when suddenly appellant somehow came to have a large hunting knife in his hand and began pounding (presumably stabbing) the deceased. There was no immediately prior argument, no scuffling, no outcry, and no resistance by the deceased despite her prior actions, temperament, and characteristic belligerence.

Appellant testified that in fact his wife became angry, the prosecution witnesses had then left the room, and his wife became angrier and slapped him. He pushed her back on the bed, she took the knife (her property) from the drawer, and swiped at him. They grappled for the knife on the bed, and in the struggle she was stabbed and cut. The nature of the actual wounds is more consistent with this explanation than that of the prosecution witnesses.

Under these circumstances, the testimony of the prosecution witnesses was so inherently incredible that a reasonable man must necessarily have had a reasonable doubt that appellant

inflicted the wounds "with malice aforethought". A judgment of acquittal should have been entered by the trial court.

In the course of cross-examining the appellant, the prosecuting attorney, without prior warning, suddenly brought out evidence of three prior convictions of assault. No discretion as to the admission of such evidence was exercised by Judge Corcoran, and there was no bench conference to ascertain relevant considerations such as the nature and circumstances of the prior incidents, appellant's age when they occurred, the degree of assault involved, and their importance (if any) to assessing appellant's credibility in this case. The appellant's extensive testimony and cross-examination in fact furnished more-than-adequate opportunity to assess his credibility without this highly dangerous and prejudicial evidence of prior convictions.

The prosecuting attorney in his closing argument referred to appellant's hot temper, and to "assaults" by appellant on his wife earlier in the evening in question, although the testimony in the record did not justify these references.

The admission of this evidence without prior exercise of discretion by the trial judge was plain error under the rule in this jurisdiction established in Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

I. THE PROSECUTION'S EVIDENCE WAS INHERENTLY INCREDIBLE; THE APPELLANT'S TESTIMONY WAS REASONABLE AND CONSISTENT WITH THE CIRCUMSTANCES; THE TRIAL JUDGE SHOULD HAVE ENTERED JUDGMENT OF ACQUITTAL BECAUSE ON THIS EVIDENCE A REASONABLE MAN WOULD NECESSARILY HAVE HAD A REASONABLE DOUBT

(Transcript pages 21-25, 27-33, 43-46, 54-75, 80-97, 109-110, 112-153)

The prosecution's case was based on the testimony of Mr. and Mrs. Humphries, long-time friends of the deceased. It is submitted that their testimony was so inherently incredible that the jury should not have been allowed to speculate as to appellant's guilt of second degree murder. The defendant's explanation of the facts was entirely consistent with the nature of the deceased's wounds and the surrounding circumstances. A judgment of acquittal should have been entered either at the close of the prosecution's case or upon the closing of proof.

The testimony established that the deceased was a strong, healthy, and belligerent woman, who would become particularly loud and argumentative when drinking (Tr. 28-31). She had been drinking on the afternoon and evening in question, and she had been cursing and aggressive during this period (Tr. 31, 65-66, 114, 117-118, 120-121, 128, 130). It is absolutely inconceivable that a person of such character and temperament would not have resisted physically, and protested vocally, if she were about to be stabbed under the conditions which the Humphries' testimony would suggest.

If the Humphries' story is accepted, the deceased had ample time to recognize the threat and react to it. When Mrs. Humphries turned away for a cigarette, the appellant would have had to take the knife from the night table drawer in full vision of his wife seated on the bed in the small, crowded room (Tr. 58, 71). Since it was Mrs. Humphries' scream which awakened Mr. Humphries, who being asleep (Tr. 59), then raised up to see the appellant "pounding" the deceased (Tr. 82), Mrs. Humphries must have seen the appellant (if she is believed) with the knife before any blows were struck. She screamed and ran from the room but did not see appellant stab his wife (Tr. 57-59). Mr. Humphries raised up and then saw the alleged pounding.

While all these actions could have happened almost instantly, there certainly was time enough for the deceased to offer some resistance or make some outcry. Yet, both Mr. and Mrs. Humphries testified to the unbelievable facts that there was no prior argument, no scuffling, no outcry, no resistance by the deceased, and nothing unusual except the actual "pounding" (Tr. 70, 72-74, 82, 93-95). It simply defies belief that the deceased would have permitted the appellant to attack her with a large hunting knife without the slightest show of alarm, scream, protest, resistance, or attempt to defend herself.

Furthermore, it is absurd to think that one minute four persons could be talking normally about "nothing important"

(Tr. 56), and in the instant it takes to turn away and get a cigarette from a dresser, appellant could have gotten a large hunting knife and started to stab his wife.

Mrs. Humphries insisted repeatedly that she saw no stabbing. (Tr. 57, 59).

Appellant's testimony is a much more reasonable explanation of the facts and would require acquittal on the basis of self-defense, or at most a conviction of manslaughter for using excessive force and means of self-defense and thereby causing his wife's death. The deceased, consistent with her prior belligerent conduct, slapped him, and when he pushed her back on the bed, she took the knife out of the drawer and "swiped" at him (Tr. 120, 138-141). In grappling for the knife on the bed, she was stabbed in the chest, again (not deeply (Tr. 46)), in the side of the chest, and was cut on the hands and neck (Tr. 45). These wounds are much more consistent with a struggle for the knife, rather than the "pounding", "three or four times", without resistance by the deceased, which Mr. Humphries allegedly observed (Tr. 82).

In such a pounding or stabbing of the deceased lying back on the bed (Tr. 82, 95-96), there would not normally be one wound on the front of the chest, one in the side, and cuts on the hands. Such wounds would result from struggling and grappling for a knife.

Other circumstances support the appellant's testimony. Mrs. Sterling's testimony suggests that Mrs. Humphries was not in the room except for an instant, presumably after the wounds had been inflicted (Tr. 23-24), not the fifteen minutes or more prior thereto to which the Humphries testified (Tr. 91). Appellant testified the Humphries had left the room before the struggle occurred (Tr. 120, 146). The Humphries testimony is itself inconsistent. Mrs. Humphries testified three times that her husband was asleep (Tr. 59, 64, 74); he testified he was not (Tr. 94). She testified as to loud statements by the deceased (Tr. 68), which he says he did not hear. She testified the deceased was lying across the bed (Tr. 59), while Mr. Humphries said the deceased was sitting upright after his wife screamed (Tr. 96).

Taking the record as a whole, the testimony of the prosecution witnesses was inherently unbelievable. The trial judge should have determined that there necessarily was a reasonable doubt whether the appellant had inflicted the wounds on his wife, or at least whether he had inflicted them "with malice aforethought." As stated in Cooper v. United States, ___ U.S. App. D.C. ___, 357 F.2d 274, 276 (1966), "Perhaps the jury could reasonably think he was probably guilty, but this is not enough to support a criminal conviction." See also Curley v. United States, 81 U.S. App. D.C. 389, 160 F.2d 229 (1947).

Judgment of acquittal should have been entered at the close of the prosecution's case or upon the closing of proof. A motion for acquittal was made at the close of the prosecution's case and denied by Judge Corcoran who stated: "I will let the case go to the jury" (Tr. 109-110). On the closing of proof it was evident that the court was of the same mind and it would have been useless to renew the motion (Tr. 147, 150, 153).

The Curley case is the leading authority for the rule that on a motion for a directed verdict, the judge must assume the truth of the Government's evidence and give the Government the benefit of all legitimate inferences to be drawn therefrom. But where the prosecution's only evidence is so inherently unbelievable or inconsistent as necessarily to cast reasonable doubt as to its authenticity, a reasonable mind must entertain a reasonable doubt, and a conviction must be reversed. Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954).

II. IT WAS PLAIN ERROR FOR THE TRIAL JUDGE NOT TO EXERCISE ANY DISCRETION IN ADMITTING EVIDENCE OF APPELLANT'S SEVERAL PRIOR ASSAULT CONVICTIONS

(Transcript pages 143-145, 163, 169, 187-188)

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In the present case, the cross-examination of the appellant as to the events occuring during the night Octavia Lewis died was proceeding as follows:

"Q. What did you say to them? (the police)

A. If I said anything at all -- and I don't recall saying -- if I said anything at all, it must have been, 'I would much rather that it be me than my wife.'

Q. Do you recall saying that?

A. No, I don't recall saying anything to anybody other than the officers." (Tr. 144).

Suddenly, without any prior warning, the prosecutor then interjected the following questions:

Q. Now, are you the same Tommie D. Lewis who was convicted of assault and battery in 1965 in Virginia?

A. Yes.

Q. Are you also the same Tommie Lewis who was convicted of assault and battery in Virginia in 1958?

A. Yes.

Q. Are you also the same Tommie Lewis who was convicted of assault in Washington in 1960?

A. Yes.

Q. Did you hear Octavia call Detroit?

A. I heard her talking on the phone. I heard her place the call to Detroit." (Tr. 144-145).

There was no objection by defense counsel, no bench conference, no exercise of discretion by the trial judge as to admission of this evidence as required by this court's decision in Luck v. United States, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965).

In his closing argument, the prosecutor described appellant as having a hot temper (Tr. 169), although there was no prior evidence of any kind in the record to substantiate this alleged fact. He also stated, in substance, that appellant had assaulted his wife twice during the evening (Tr. 163), although Mrs. Sterling's testimony did not justify such allegations.

In his charge to the jury, Judge Corcoran included the customary statement that the prior criminal record has no bearing on the question of guilt or innocence but goes solely to the evidence of credibility (Tr. 187-188).

In Luck, this Court held that §14-305, D.C. Code, providing that prior criminal convictions may be given in evidence to affect credibility, does not require the trial court to allow such evidence. To the contrary, this Court held that the trial judge must exercise sound judicial discretion in deciding whether, if at all, to admit such evidence:

> "There may well be other cases where the trial judge believes the prejudicial effect of impeachment far outweighs the probative relevance of the prior conviction to the issue of credibility. This last is, of course, a standard which trial judges apply every day in other contexts; and we think it has both utility and applicability in this field." 121 U.S. App. D. C. at p. 156.

Most recently, in Brown v. United States, ___ U. S. App. D.C. ___ (No. 20,041)(Decided November 10, 1966), this Court reversed a conviction of assault with a dangerous weapon on authority of the Luck case where the trial court refused to rule a prior conviction of assault with a dangerous weapon inadmissible. Defense counsel requested such a ruling before putting the defendant on the stand, and the trial court ruled adversely without considering factors suggested by the Luck case, such as the nature of the prior crimes and the length of the criminal record. In reversing because of the failure of the trial court to apply such factors or standards, this Court stated (at pp. 6-7 of the slip opinion):

> "This is not to say that a prior conviction has no relevance to credibility. It is to say that the trial judge, in weighing the prejudice that might result from its admission against the interest in having the defendant testify, should focus on just how relevant to credibility a particular conviction may be. While one who has recently been convicted of perjury might well be suspected of lying again under oath, the fact that a defendant accused of assault has already been convicted of assault has no such bearing on credibility. Certainly the prior assault establishes a history of violent behavior, but proof of prior violent behavior is inadmissible to prove assault. See Michelson v. United States, 335 U.S. 469, 475-476 (1948)."

See also dissenting opinion in Stevens v. United States, ___ U. S. App. D. C. ___ (No. 19,883)(Decided October 20, 1966),

where Judge Fahy considered that evidence of numerous prior convictions had a prejudicial effect which far outweighed its probative relevance to the defendant's credibility.

In the present case, the conflict between the testimony of the prosecution witnesses and the appellant was clearly brought out in every detail, and the jury had more than adequate opportunity to judge the appellant's credibility from his testimony and his demeanor. If the appellant's testimony is accepted, he was not guilty of second degree murder but acted only in self-defense. The action of the prosecutor in introducing evidence of the prior assault convictions without warning to the judge or defense counsel was clearly objectionable. Viewed by any realistic or practical judgment, it was essentially designed to show a propensity to violent conduct, not simply a propensity on the part of the appellant to be untruthful. The prosecutor's emphasis on the appellant's "hot temper" and assaults on his wife in his closing argument, without adequate record foundation, discloses the real purpose of this evidence.

Prior assault convictions are not a sound indication of credibility. At most, as observed in Brown, supra, they establish a history of violent behavior, inadmissible to prove second degree murder. Convictions of perjury or other crimes involving false statement or dishonesty may show a tendency to lie, but assault does not. Assault generally results from a

hot temper, not a clever or conniving nature. There are degrees and degrees of assault, ranging from a simple street fight to assault with a dangerous weapon with intent to kill. The nature of the assaults of which appellant was previously convicted was not considered by Judge Corcoran.

More recently, it has generally been concluded that evidence of prior convictions should be excluded except as to crimes involving dishonesty or false statement. Commissioners on Uniform State Laws, Uniform Rules of Evidence, Rule 21; American Law Institute, Model Code of Evidence, Rule 106 (1942). As stated by Judge Youngdahl in Colter v. Einbinder, 184 F. Supp. 523, 525 (D. D.C. 1960), "The basis for this rule (permitting evidence of prior convictions for impeachment) does not exist when the crime for which the witness has been convicted is not of such a dishonesty-evincing nature." The rule must be even more carefully applied where the witness is the defendant on trial for alleged murder. See Michelson v. United States, 335 U.S. 469, 480-481 (1948).

The trial judge in this case should have made inquiries out of the hearing of the jury as to the nature and seriousness of the prior assaults, including whether the convictions involved only petty crimes (see Pinkney v. United States, ___ U. S. App. D.C. ___, 363 F.2d 696 (1966)). The trial judge should have determined and considered the appellant's age when they were committed, as well as other relevant factors

under the standards of the Luck case. There are no facts in the present record by which these standards may be applied. The failure to apply such standards is reversible error, as in Brown v. United States, supra.

It is no answer to say that when the appellant elected to take the stand, he subjected himself to cross-examination just as any other witness. This defendant had to take the stand to bring out the actual facts; there was no other testimony or evidence which could have been presented under the circumstances of this case to prove the facts from the appellant's standpoint. In this respect, the present case is just like the Luck case where the defendant also had to take the stand in the absence of any other evidence supporting his view of the facts. This court said:

> "The possibility of a rehearsal of the defendant's criminal record in a given case, especially if it means that the jury will be left without one version of the truth, may or may not contribute to that objective. The experienced trial judge has a sensitivity in this regard which normally can be relied upon to strike a reasonable balance between the interests of the defendant and of the public." 121 U.S. App. D.C. 157, 348 F.2d 769 (1965).

Unfortunately for the appellant in the present case, Judge Corcoran did not undertake to strike this balance.

The charge to the jury did not cure the prejudice; it is thoroughly unrealistic to think that the jury would restrict their knowledge of the prior convictions to the limited purpose

of assessing credibility. Pinkney v. United States, supra; Awkard v. United States, 122 U.S. App. D.C. 165, 170, 352 F.2d 641, 646 (1965). As Judge Fahy observed in Stevens, "a jury cannot be expected to departmentalize such evidence." Recent jury studies indicate that juries "failed to segregate evidence of a prior record introduced for impeachment purposes and used it instead as an indication that the defendant 'was a bad man' and hence was more likely than not guilty of the crime for which he was then standing trial." Note, Procedural Protections of the Criminal Defendant -- A Revaluation of the Privilege Against Self-Incrimination and the Rule Excluding Evidence of Propensity To Commit Crime, 78 Harv. L. Rev. 426, 441 (1964). Juries simply cannot handle long, complicated instructions, and a reference to this limited use of the evidence in the middle of such instructions cannot fairly be held to cure the prejudice resulting from failure by the trial judge to exercise discretion as required by the Luck case. See Jackson v. Denno, 378 U.S. 368 (1964).

In the present case, the prosecution's real purpose in introducing evidence of the prior convictions was to convince the jury that appellant was the type of person who would strike out in anger, as he had in the past. Thus, he allegedly was the type of person prone to commit acts of the very type he was charged with committing in the indictment. Evidence of prior convictions introduced for this purpose is clearly improper and prejudicial.

The failure of the appellant's court-appointed trial counsel to object should be of no consequence in the present circumstances. The Luck case represents a well-known rule to prosecuting attorneys in this jurisdiction. Such prosecutors, in fairness to criminal defendants, particularly where defense counsel is court-appointed, have a positive obligation to take up the matter of introducing prior criminal convictions with the judge and defense counsel out of the hearing of the jury before making any reference to such evidence. Here, the prosecutor "slipped in" the evidence in the middle of cross-examination as to the events of the fateful night without any prior warning to defense counsel or the trial judge. The situation here is entirely different from that in Walker v. United States, ___ U.S. App. D.C. ___, 363 F.2d 681 (1966), where the prosecutor --

> "with commendable sensitivity to the significance of the matter, interrupted his cross-examination for the purpose of approaching the bench to inform the court and defense counsel that he was about to ask about the prior convictions, * * *." (at 363 F.2d 682).

The court had a positive duty to exercise the discretion called for by the Luck case; this was a case of plain error under Rule 52(b), Fed. R. Crim. Procedure. Dissenting opinion in Stevens v. United States, supra. See 1 Underhill, Criminal Evidence §163 at 301, §165 at 314 (5th Ed. 1956).

This court many times has called upon trial courts for the most careful and judicious application of the Luck rule because of the seriously prejudicial danger to criminal defendants. See, for example, Pinkney v. United States, supra. The authorities more and more are in agreement that this vestige of the common law violates fundamental concepts of fairness and should be limited at least to prior convictions of crimes involving dishonesty or false statement. McCormick Evidence, §43 at 94 (1954); Note, 78 Harv. L. Rev. 426, 441, supra; Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale L. J. 763, 778 (1961); Ladd, Credibility Tests - Current Trends, 89 U. Pa. L. Rev. 166, 191 (1940). As Judge Fahy observed in Stevens, the present rule permitting such impeachment evidence is a remnant of a discarded rule rather than a rule which evolved on its own merits.

In the last analysis, this was a close case on the record. The story told by the prosecution witnesses is inherently incredible (supra pp. 14-18). If the appellant is believed, he acted in self-defense, a story consistent with the clear evidence in the record of the deceased's temper and her propensity to heavy drinking. It may well have been this improper evidence of three prior convictions of assault which caused a juror to put aside the reasonable doubt which he or

she otherwise entertained as to the appellant's guilt. Appellant should be granted a new trial with indications that the trial judge should exercise discretion as to the prior convictions consistent with the rule of the Luck case.

CONCLUSION

For the reasons stated in Point I above (pp. 14-18), the judgment of conviction of appellant Tommie D. Lewis in Criminal Action No. 1131-65 in the United States District Court for the District of Columbia, should be reversed and remanded with instructions to enter a judgment of acquittal.

If the Court rejects Point I, appellant's conviction should be reversed and remanded for a new trial as set forth in Point II above (pp. 18-28) with instructions to the trial court to exercise discretion before admitting any evidence of prior assault convictions of the appellant.

Respectfully submitted,

John S. Nolan
Appointed by this Court

Burke W. Willsey

1700 Pennsylvania Avenue
Washington, D. C. 20006

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief for Appellant on appellee by mailing a copy thereof, first class mail, postage prepaid, this ___ day of December, 1966, to David G. Bress, Esquire, United States Attorney in and for the District of Columbia, United States Court House, Washington, D. C.

John S. Nolan

APPENDIX

District of Columbia Code (1961 Ed. as amended).

§22-2403. Murder in second degree.

Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another, is guilty of murder in the second degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 800; June 12, 1940, 54 Stat. 347, ch. 339.)

§22-2402. Murder in first degree--Placing obstructions upon or displacement of railroad.

Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 799).

§22-2401. Murder in the first degree--Purposeful killing--Killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22-401 or 22-402, rape, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 798; June 12, 1940, 54 Stat. 347, ch. 339).

§14-305. Conviction of crime not to disqualify witness--Conviction may be shown--How proved.

No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him shall not be concluded by his answers as to such matters. In order to prove such conviction of crime it shall not be necessary to produce the whole record of the proceedings containing such conviction, but the certificate, under seal, of the clerk of the court wherein such proceedings were had, stating the fact of the conviction and for what cause, shall be sufficient. (Mar. 3, 1901, 31 Stat. 1357, ch. 854, § 1067; June 30, 1902, 32 Stat. 540, ch. 1329).

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,120

TOMMIE D. LEWIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
SCOTT R. SCHOENFELD,
Assistant United States Attorneys.

Cr. No. 1131-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) May appellant now attack the verdict and the Government's *prima facie* case on the sole basis of the incredibility of the Government's witnesses, where he failed to present the issue to the judge at trial, but fully presented and argued it to the jury which rejected his claim?

(2) May appellant overturn the jury's verdict for admission of three prior misdemeanor convictions to impeach his credibility, where he failed either to invoke the trial judge's discretion to exclude them or to object to their admission?

INDEX

TABLE OF CASES

Cases—Continued

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,120

TOMMIE D. LEWIS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant was indicted for murder in the second degree (22 D.C. Code § 2403). After a two-day trial before Judge Howard F. Corcoran and a jury, he was found guilty as charged on February 4, 1966. Appellant was sentenced to imprisonment for five to twenty years. This appeal without prepayment of costs followed.

The Government's Case

After preliminary matters,[1] trial of the case opened with the presentation of the first of six witnesses for the Government, among whom were three who had been present in the deceased's apartment during the commission of the crime. Mrs. Lorraine R. Sterling, a friend of both appellant and the deceased, recounted the events of the wedding night of September 12, 1965, which ended with the groom murdering the bride (Tr. 13-14). Toward the end of the reception after the ceremony, Mrs. Sterling stated, she noticed appellant and his bride, Octavia Lewis, out on the porch of the wedding salon (Tr. 15). At first thinking them in affectionate embrace, she then saw that there was a struggle against the bannister and that appellant had his hands at his bride's throat apparently choking her (Tr. 15-16, 32). She broke up the struggle and was assured by the new Mrs. Lewis that all was well (Tr. 16). Deciding to leave shortly thereafter, Mr. and Mrs. Sterling were enlisted by Mrs. Lewis to help transport the wedding gifts home (Tr. 16-17). On their way out of the salon, they saw appellant and his bride again fighting on the street corner (Tr. 17). Mr. Sterling separated the couple, but only after Mrs. Lewis had been thrown to the ground and injured in the knee (Tr. 17-18, 29-30). The Sterlings and other guests then drove appellant and Mrs. Lewis in separate cars to the apartment of the bride's mother, Mrs. Susie Waldrop, at 922 Delafield Place (Tr. 17-19). From there a group of about eight continued on to Mrs. Lewis' apartment at 610 Longfellow Street (Tr. 21). There Mrs. Lewis made a telephone call to Detroit (Tr. 22).

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[1] Appellant made a *pro se* motion for mental observation which was renewed by counsel on his behalf on the first morning of the trial. Counsel expressly declined to ratify, adopt or endorse it. (Tr. 4.) The court discussed the basis for this motion with appellant and counsel for both sides in chambers and concluded to proceed with the trial without granting it (Tr. 4-9). The record reveals no other evidence relating to this matter except for brief remarks by appellant at trial (Tr. 122-123).

Mrs. Sterling stated that Mrs. Lewis had been drinking, but seemed sober (Tr. 23). During the playing of some records appellant and Mrs. Lewis disappeared into the bedroom and, after a few minutes, Mrs. Sterling suggested that Mrs. Dorothy Humphries, another guest, check on them (Tr. 23-24). Mrs. Humphries went into the bedroom and sometime thereafter the door burst open and Mrs. Humphries cried out. When Mr. and Mrs. Sterling went in, they found Mrs. Lewis lying on the bed covered in blood. Present were Mr. and Mrs. Humphries and the appellant. Appellant was "just standing" there, "just looking." (Tr. 24.)

Mrs. Dorothy Humphries, the matron of honor, also took the stand. She testified that appellant and Mrs. Lewis had been drinking, but opined that they were not drunk. Mrs. Lewis appeared "a little upset" though calm. (Tr. 54-55.) In the apartment bedroom, Mrs. Humphries stated, Mrs. Lewis indicated that she did not want to be left alone with appellant, and that appellant had embarrassed her and she was going to return the wedding presents (Tr. 56, 58, 65, 72). During this time Mrs. Lewis was seated near the head of the bed with appellant standing in front of her next to a night table and dresser (Tr. 57). There were only four people in the room (Tr. 64-65). Mrs. Humphries turned away momentarily to obtain a cigarette from the dresser top (Tr. 57). When she turned back she glimpsed appellant poised with a knife raised in his hand over Mrs. Lewis, who was stretched back on the bed. The witness had not seen the blow, but she screamed and ran from the room. (Tr. 57, 59, 73.)[2] Her husband, who had been sitting dozing at the other end of the bed, leaped up and snatched the knife from appellant (Tr. 57, 63). Mrs. Humphries indicated that there had been no warning:

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[2] The testimony does not make clear whether Mrs. Lewis was stabbed or killed before or after the instant in which Mrs. Humphries saw appellant wield the knife, although it seems clear from Mr. Humphries' testimony that more blows then rained on the victim. Compare Appellant's Br. 15.

she had heard no loud argument, scream, or scuffle (Tr. 72-73). And she had seen no weapon in Mrs. Lewis' hand (Tr. 74).

Mr. Norman L. Humphries, husband of the matron of honor, also testified concerning what happened in the bedroom. He had followed his wife into the bedroom by some minutes (Tr. 91). He sat on the bed in a posture with his head down on the bed (Tr. 81). Suddenly his wife screamed. He jumped up and saw appellant "pounding" Mrs. Lewis' body with a knife in his hand. Appellant hit her three or four times before Mr. Humphries could get the knife from him. (Tr. 82-84, 94-96.) The woman never stood up or uttered a sound, and she had no weapon (Tr. 82, 95). Mr. Humphries attempted to call the police, then ran to the street and hailed a scout car, turning the knife over to the officers (Tr. 83-84).[3] When he returned with the officers, appellant stated to him, "I rather see her dead than alive [sic]" (Tr. 84, 97). Mr. Humphries stated that he understood that Mrs. Lewis had not wanted the Humphries to leave, but he did not hear any conversation about embarrassment or returning the presents (Tr. 81, 93). He said he had not actually been asleep at the instant of the attack, and confirmed that it had not been preceded by any loud argument or scuffle (Tr. 94-95). Appellant and Mrs. Lewis were not drunk, Mr. Humphries said, and appellant did not resist his taking the knife (Tr. 89, 96-97).

Private Verlin C. Fitzer of the Sixth Precinct testified that he responded to a radio call and recovered the knife, which was admitted in evidence, from Mr. Humphries (Tr. 99-100). He stated that he found Mrs. Lewis on the bed no longer breathing, and that immediately on approaching appellant in the bedroom, appellant said to him, "That's my wife, Officer. I killed her." The officer advised him of his right not to say anything, but appellant repeated his statement. (Tr. 101-102.) Private John

[3] The police apparently were reached on the telephone by Mr. Sterling (Tr. 25).

H. Barnard of the Identification Bureau also testified concerning photographs of the body and scene which he took and which were admitted in evidence (Tr. 106-108).

There was a stipulation that Mrs. Lewis was pronounced dead in the early hours of September 13, 1965 at D.C. General Hospital (Tr. 48-49). Testimony was taken out of order from Mrs. Waldrop, who identified her daughter's body to Dr. Marion Mann at the D.C. Morgue (Tr. 76). Dr. Mann, a Deputy Coroner, testified that he performed an autopsy on Mrs. Lewis' body shortly after noon on September 13 (Tr. 43). She was 32 years old, weighed 130 pounds, and stood five feet four inches (Tr. 44). The body had six wounds: a five-inch deep stab through the chest to the heart and lung, a three-and-a-half-inch deep stab through the right flank to the liver, a superficial cut on the front of the neck, a very deep wound on the back of the left hand, a small cut on the right hand, and a superficial abrasion on the right knee (Tr. 44). Death resulted from the stab to the heart, which penetrated the cartilage of the third rib and thus evidenced the use of "considerable force" (Tr. 44, 46).

The Defense

At the close of the Government's case, appellant moved for judgment of acquittal on the sole basis that the Government had not shown malice.[4] The court denied the motion, noting that malice could be inferred from the use of a deadly weapon (Tr. 109). Although argued to the jury in closing, no mention to the court was made by the defense attorney of any claim of inherent incredibility of the Government's evidence as a possible basis for a judgment of acquittal.

The only witness presented for the defense was the appellant himself. With no suggestion whatsoever to the court of a wish for a *Luck* hearing, appellant took the

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[4] The record at this point unaccountably speaks of first degree murder. It seems clear, however, that no one was under the misapprehension that this was the charge. (Tr. 109.)

stand immediately after opening statement by his counsel. Appellant explained that his misunderstanding with the bride began at the wedding reception when it came time to pay the band and she cursed him in public. He "just couldn't get over" this, he said. (Tr. 113.) From here, where the Government's evidence took up, his story diverged. The incident on the salon porch, he claimed, was not a fight as the Government's witness thought, but only showing off. His hands were on the woman's shoulders, not her neck. And he was helping his wife up on the bannister when they both fell head over heels to the porch a couple of feet down. She was drinking. (Tr. 113-114, 124-125.) Out on the street, though the couple again had their hands on each other's shoulders, they were not fighting. Mr. Sterling, said appellant, was mistaken when he ran up and flung appellant to the ground to break up a fight. (Tr. 115, 130-131.) But appellant did have a small argument with the bride when they got to her mother's place (Tr. 115-116).

Thereafter, at his wife's apartment which he had shared with her before the marriage (Tr. 116), more coal was added to fuel the fire. The bride telephoned to Detroit and told appellant she was leaving him to go there next day (Tr. 126, 128). Appellant testified that this upset him and, though he was in control of his faculties, he was "very much hurt over this thing" (Tr. 127, 129-130). She took off her wedding rings, he claimed, and threw them to the floor, telling appellant to go and get his money back (Tr. 121, 135). She also told him that she was going to return the wedding presents (Tr. 121). Then she invited the Humphries to spend the night with them (Tr. 119). Appellant claimed Mrs. Humphries changed into one of his wife's dresses while the two couples were together in the bedroom, and that as soon as the Humphries left the room his wife accused him of looking at Mrs. Humphries (Tr. 119-120, 138). Appellant stated he denied doing so. Then, he said, while they were alone in the room, his wife slapped him. He pushed her across the bed. Then she came off the bed at him

with a knife, whereupon they grappled and fell face down on the bed with him on top and the knife under the woman. (Tr. 120, 138-139.) Appellant did not see the knife go into her (Tr. 140). He snatched it from her when she rolled onto her back. The only thing she said was, "Baby, I love you." (Tr. 120, 139).

Appellant on direct admitted making the statement to the officer that he had killed his wife, though on cross-examination he recanted this statement (Tr. 122, 144). He then claimed that if he said anything at all, it was, "I would much rather that it be me than my wife" (Tr. 144). Thereupon, appellant's testimony was impeached with three prior convictions, each of which he admitted (Tr. 144-145).[5] No objection was made, and no hearing had been requested. In closing, appellant stated he had known where his wife kept the knife, and reported his own height as six feet and weight as 205 pounds (Tr. 145-146).

Closing Matters

At the close of the evidence, the court conferred with counsel out of the presence of the jury in regard to instructions. Appellant's counsel requested and received a manslaughter instruction, noting on the record at the time of this request that he had earlier offered to plead appellant guilty to a manslaughter charge (Tr. 151-152). In answer to a question from the court, counsel expressly declined to move for judgment of acquittal at the end of the proof (Tr. 153).

In closing argument, defense counsel argued that it was "incredible" that appellant would stab his wife to death in the presence of two witnesses while she made no outcry (Tr. 174). The court instructed the jury in regard to judging the witnesses' credibility (Tr. 183-

[5] The convictions were: assault and battery, Virginia, 1956; assault and battery, Virginia, 1958; assault, District of Columbia, 1960. We are informed that a typographical error discovered in the transcript which incorrectly placed the first conviction in 1965 instead of 1956 is being corrected by the court reporter.

185), and in regard to the limited use for impeachment of appellant's criminal record (Tr. 187). The jury took the case at 11:43 A.M. and returned its verdict at 2:05 P.M. (Tr. 201-202).[6]

STATUTES INVOLVED

Title 14, District of Columbia Code, Section 305, provides:

> A person is not incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime. The fact of conviction may be given in evidence to affect his credibility as a witness, either upon the cross-examination of the witness or by evidence aliunde; and the party cross-examining him is not bound by his answers as to such matters. To prove the conviction of crime the certificate, under seal, of the clerk of the court wherein proceedings containing the conviction were had, stating the fact of the conviction and for what cause, is sufficient.

Title 22, District of Columbia Code, Section 2403, provides:

> Whoever with malice aforethought, except as provided in sections 22-2401, 22-2402, kills another is guilty of murder in the second degree.

SUMMARY OF ARGUMENT

I

Although precluded by his failure properly to raise the issue to the judge at trial, appellant here seeks reversal on the ground of inherent incredibility of the Government's evidence at trial. Appellant does not challenge the sufficiency of the evidence except insofar as it depends upon the credibility of the Government witnesses.

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[6] The record does not indicate whether a part of this period was taken up by the jury having lunch.

This credibility issue was presented and argued to the jury and may not be retried on appeal.

II

Appellant voiced no objection to his impeachment with three prior misdemeanor convictions, nor did he attempt to invoke the court's discretion to exclude them. The Government's evidence was powerful and the jury received appropriate instructions. Appellant should therefore be precluded from claiming reversal on this ground.

ARGUMENT

I. The trial court properly submitted the case to the jury and the evidence supported the verdict.

(Tr. 23-24, 44, 46, 57, 59, 72-74, 82-84, 94-96, 101-102, 109, 120, 122, 138-139, 144, 153, 174)

As the Counterstatement sets out, appellant's participation in the homicide was admitted and his defense consisted of a claim of accident in the course of self-defense. The contested questions of whether appellant was the aggressor, and if not, whether the killing was accidental or justified as in self-defense, were plainly presented by the evidence and arguments. Viewing the evidence in the light most favorable to the Government,[7] the evidence was clearly sufficient for the jury and for the verdict.[8] Indeed, appellant does not appear to ques-

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[7] See, *e.g.*, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232, *cert. denied*, 331 U.S. 837 (1947).

[8] Having introduced his own testimony following denial of his only motion for judgment of acquittal at the end of the Government's case, appellant waived his challenge to the Government's *prima facie* case. *E.g.*, *Battle* v. *United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (1953); *Hall* v. *United States*, 83 U.S. App. D.C. 166, 169, 168 F.2d 161, 164, *cert. denied*, 334 U.S. 853 (1948); *Ladrey* v. *United States*, 81 U.S. App. D.C. 127, 130, 155 F.2d 417, 420, *cert. denied*, 329 U.S. 723 (1946); see *Perovich* v. *United States*, 205 U.S. 86, 91 (1907) (dictum). *Cephus* v. *United States*,

tion the sufficiency of the evidence in the abstract. His contention that the trial court erred in failing to direct acquittal rests on a quarrel with credibility. But the attack made here, though never made to the trial judge, was made to the jury and rejected by it. The short of the matter is that questions of credibility are for the jury—even where the testimony is thought to be bizarre, implausible, unreliable, or incredible. *E.g.*, *Trimble* v. *United States*, D.C. Cir. No. 19942, decided September 15, 1966, slip op. at 2; *Young* v. *United States*, 114 U.S. App. D.C. 42, 43, 309 F.2d 662, 663 (1962); *Wigfall* v. *United States*, 97 U.S. App. D.C. 252, 253, 230 F.2d 220, 221 (1956).

Appellant's specific attacks upon the testimony of the Government witnesses do not require extensive commentary. If the crime was bizarre, there was nothing bizarre about the Government's evidence. The absence of struggle and outcry which so disturbs appellant is quite explicable in terms of the sudden and deathly attack. Appellant has pointed to no inconsistency in the prosecution's evidence that does not have a plausible explanation in the usual variables of time, place, and observation. Far from making a "close case" the evidence, indeed, may fairly be characterized as overwhelming. In any event, the jurors who saw and heard the witnesses were the proper arbiters of the credibility which appellant would now retry. *E.g.*, *Glasser* v. *United States*, *supra* at 80; *Curley* v. *Uinted States*, *supra* at 394, 160 F.2d at 233.

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117 U.S. App. D.C. 15, 324 F.2d 893 (1963), is not to the contrary, for it dealt with a special circumstance not here present. Even the motion made did not set forth the incredibility basis now urged on appeal (Tr. 109). And counsel did not see fit to renew the motion when the evidence now relied upon had been presented and would have been available for argument (Tr. 153).

II. The trial court did not commit plain error in permitting impeachment of appellant by prior convictions.

(Tr. 144-145, 183-185, 187)

In *Luck* v. *United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965), this Court said that the impeachment-by-prior-conviction statute, 14 D.C. Code § 305, leaves room in the trial judge for the play of a sound judicial discretion upon the circumstances as they unfold in a particular case. Since *Luck*, this Court has made clear that a defendant who does not invoke that discretion may not complain on appeal that the introduction of prior-conviction impeachment was error. *Covington* v. *United States*, D.C. Cir. No. 19717, decided December 1, 1966; *Hood & Jackson* v. *United States*, D.C. Cir. Nos. 19650-19651, decided June 30, 1966; *Walker* v. *United States*, —— U.S. App. D.C. ——, 363 F.2d 681 (1966); *Accord*, *Blackney* v. *United States*, D.C. Ct. App. No. 4160, decided January 19, 1967. See also, *Stevens* v. *United States*, D. C. Cir. No. 19883, decided October 20, 1966 (per curiam); *Trimble* v. *United States*, D.C. Cir. No. 19942, decided September 15, 1966; *Smith* v. *United States*, —— U.S. App. D.C. ——, 359 F.2d 243 (1966). Here, as in *Covington*, "no objection was voiced by appellant's counsel and no request had been made for an inquiry by the trial judge . . . into the probative quality of the convictions. . . ." *Supra* at slip op. 2. Even where the accused invokes *Luck* in the trial court, but initiates no meaningful discourse so as to engage the trial judge's discretion, this Court has considered itself without warrant to set aside the trial judge's determination. *Hood & Jackson* v. *United States*, *supra*. Having foregone the established opportunity to attempt exclusion by invocation of the trial judge's discretion, appellant is precluded from asserting the inadmissibility of the prior-conviction evidence to overturn the jury's verdict at the appellate level.

While appellee also disagrees with the underlying premises of appellant's argument, the frequency with which

the various arguments have been made and countered in recent cases before this Court suggests there is a limited utility in renewed skirmishing over the same scarred battleground. For the convenience of the Court, however, we list in the margin certain of the briefs heretofore filed in this Court on behalf of the Government dealing with the basic arguments here leveled by appellant.[9] We would further invite the Court's attention to *Spencer* v. *Texas*, 35 U.S. L. WEEK 4164 (U.S. January 23, 1967), which provides new insight into a related area of concern.[10] Finally, we urge that the striking weight of the evidence given by three witnesses at the scene of the crime, viewed in light of the serious weaknesses in appellant's position and the appropriate instruction to the jury (Tr. 187), makes it unnecessary to indulge here in a fine balancing process which this Court has insisted must be left in the hands of the judge who lives through the trial. *Luck* v. *United States*, *supra* at 156, 157, 348 F.2d at 768, 769. See, *Covington* v. *United States*, *supra*.

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[9] Briefs for appellee in *Joseph Thomas* v. *United States*, D.C. Cir. No. 20435, filed January 23, 1967; *Joseph Young* v. *United States*, D.C. Cir. No. 20269, filed December 19, 1966; *Covington* v. *United States*, *supra*, filed October 27, 1966; *Stevens* v. *United States*, *supra*, filed September 2, 1966; *Trimble* v. *United States*, *supra*, filed July 11, 1966.

[10] This case holds merely that the use of prior-conviction evidence in state criminal jury trials under the recidivist statutes does not violate the Fourteenth Amendment. But the Court took occasion to note recent commentary which has suggested a broader range of admissibility of such evidence. *Supra*, at 4166, n.7. The Court also pointed out that the admission of even prejudicial prior-conviction evidence is generally regarded as depending merely on the existence of a valid governmental purpose such as an attack on credibility. *Supra*, at 4166. And the Court stated the view that our system of jurisprudence places a reliance on the responsibility and intellingence of the jury which is supported by the most recent empirical data available. *Supra*, at 4166-4167, especially n.8.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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